

In its decision of December 30, 1993, the Appeals Board found the claimant entitled to permanent partial disability benefits based upon a work disability of ten percent (10%). The Appeals Board found respondent had offered claimant employment within his permanent work restrictions and limitations, but would incur a ten percent (10%) loss of wage. Claimant contended the job offered by respondent should not be considered because he would have been required to work twelve (12) hours per day, seven (7) days per week. Although the respondent did not introduce testimony to the contrary, the Appeals Board gave claimant's testimony regarding the number of hours he would be required to work little weight because it seemed improbable. Subsequently, the Court of Appeals ruled, "Although an 84-hour work week seems highly unlikely, this evidence was uncontradicted and must be assumed to be true."

On review, the Court of Appeals upheld the finding of the Appeals Board that claimant had failed to prove loss of access to the open labor market and cited K.S.A. 1987 Supp. 44-510e, which provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

After leaving Boeing in August 1987, claimant underwent bilateral carpal tunnel releases in September and November of the same year. After recovering from surgery, claimant began work for another employer, Smith Fiberglass, earning seven dollars (\$7) per hour. The parties stipulated into evidence documents from Smith Fiberglass that indicated claimant was earning a monthly salary of \$1,495, excluding fringe benefits, in September 1991. That is the most current information the record contains concerning claimant's wage. There is no evidence from a vocational or labor market expert regarding claimant's wage-earning potential or ability. Comparing claimant's stipulated average weekly wage on the date of accident, \$726.85, to the monthly salary claimant was earning at Smith Fiberglass, \$1,495, or \$345 per week, yields a difference of fifty-three percent (53%).

As required by K.S.A. 1987 Supp. 44-510e, the trier of fact must consider both loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage in determining permanent partial general disability. Because claimant has failed to prove the extent of loss of ability to perform work in the open labor market, that loss is found to be zero.

The Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage. See *Schad v. Hearthstone Nursing Center*, 16 Kan. App. 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this instance there is no compelling reason to give either factor greater weight. Therefore, the Appeals Board averages the fifty-three percent (53%) wage loss with the

zero percent (0%) loss of ability to perform work in the open labor market and finds claimant has sustained a twenty-seven percent (27%) permanent partial general disability.

The Appeals Board adopts the findings and conclusions set forth in the Award of the Administrative Law Judge and those set forth by the Appeals Board in its previous Order entered in this proceeding on December 30, 1993, that are not inconsistent with the specific findings set forth herein or contrary to the findings of the Court of Appeals.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated October 11, 1993, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bobby G. Berry, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred on August 27, 1987, and based upon an average weekly wage of \$726.85, for 13.29 weeks of temporary total disability compensation at the rate of \$256.00 per week, or \$3,402.24, followed by 401.71 weeks of permanent partial disability benefits at \$130.84 per week or \$52,559.74, for a 27% work disability, making a total award of \$55,961.98.

As of March 16, 1995, there is due and owing claimant 13.29 weeks of temporary total disability compensation at the rate of \$256.00 per week, or \$3,402.24, followed by 380.85 weeks of permanent partial disability compensation at the rate of \$130.84 per week in the sum of \$49,830.41, for a total of \$53,232.65 which is ordered paid in one lump sum, less any amounts previously paid. The remaining balance of \$2,729.33 is to be paid for 20.86 weeks at the rate of \$130.84 per week, until fully paid or further order of the Director.

The claimant is entitled to unauthorized medical expense up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

Barber & Associates	
Deposition of Tyrone D. Artz, M.D.	\$325.80
Deposition of George Lucas, M.D.	\$190.00
Transcript of Regular Hearing	\$220.90
Deposition of Opal Jones	\$618.55
Deposition of Bobby Berry	\$392.00

The Workers Compensation Fund is responsible for one-third ($\frac{1}{3}$) of all temporary total disability, permanent partial disability, medical benefits, vocational rehabilitation expenses, litigation costs and all other amounts awarded to claimant herein or associated with this Award.

IT IS SO ORDERED.

Dated this ____ day of March 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Fry, Wichita KS
Vaughn Burkholder, Wichita KS
Cortland Q. Clotfelter, Wichita KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director